Supreme Court, U.S.
FILED
MAR 23 2011

No. 10-339

In the Supreme Court of the United States

KIRK BENOIT, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
MARLEIGH D. DOVER
BENJAMIN M. SHULTZ
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

In 1998, Congress enacted Section 741 of Public Law No. 105-277, 112 Stat. 2681-30, in order to permit farmers to bring certain time-barred discrimination claims against the Department of Agriculture. Petitioners submitted claims under that statute to the agency for administrative resolution, but then brought suit in federal court without requesting a hearing before an administrative law judge or receiving a final administrative denial. The question presented is:

Whether petitioners' claims in federal court are barred due to their failure to exhaust administrative remedies.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 10
Conclusion 16

TABLE OF AUTHORITIES

Cases:

Bell v. *New Jersey*, 461 U.S. 773 (1983) 13
Booth v. *Churner*, 532 U.S. 731 (2001) 9
Bowles v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) 12
Chevron, U.S.A. Inc. v. *NRDC, Inc.*, 467 U.S. 837 (1984) 13
Darby v. *Cisneros*, 509 U.S. 137 (1993) 8, 12
McCarthy v. *Madigan*, 503 U.S. 140 (1992) 7, 9, 13, 14
McDonald v. *Vilsack*, SOL Docket No. 09-0177, 2010 WL 3025816 (U.S.D.A. July 8, 2010) 15
McKart v. *United States*, 395 U.S. 185 (1969) 14
Richard Pearson, In re, SOL Docket No. 09-0178 (U.S.D.A. Oct. 13, 2010) 15
Thomas Jefferson Univ. v. *Shalala*, 512 U.S. 504 (1994) 12

Statutes and regulations:

Administrative Procedure Act, 42 U.S.C. 1981 ..... 7, 8, 12

Statutes and regulations—Continued: Page

Equal Credit Opportunity Act, 15 U.S.C. 1691:
15 U.S.C. 1691(a)(1) 2
15 U.S.C. 1691e(a) 2
15 U.S.C. 1691e(d) 2
15 U.S.C. 1691e(f) 2
Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681:
§ 741, 112 Stat. 2681-30 ..... *passim*
§ 741(a), 112 Stat. 2681-30 ..... 3, 10, 14
§ 741(b), 112 Stat. 2681-30 ..... 3, 6, 10
§ 741(b)(1), 112 Stat. 2681-30 3
§ 741(b)(2), 112 Stat. 2681-30 3
§ 741(b)(3), 112 Stat. 2681-31 3
§ 741(c), 112 Stat. 2681-31 ..... 3, 8, 10, 12
§ 741(d), 112 Stat. 2681-31 3
§ 741(g), 112 Stat. 2681-31 3
7 U.S.C. 2279 note 3
7 U.S.C. 6912(e) 7, 8, 10, 15
7 C.F.R.:
Section 15.52 (1997) 2
Section 15d 4
Section 15d.2 ..... 2, 3
Section 15d.4 2
Section 15f 4, 12
Section 15f.5 6
Section 15f.8 4

Regulations—Continued: Page

Section 15f.9 ..... 4, 5, 11
Section 15f.10 ..... 4, 14
Section 15f.12 ..... 5, 11
Section 15f.13 11
Section 15f.21(d) 5
Section 15f.21(d)(1) 14
Section 15f.24(a) 5
Section 15f.24(b) 5
Section 15f.26 5

Miscellaneous:

31 Fed. Reg. 8175 (1996) 2
63 Fed. Reg. (1998):
pp. 62,962-62,963 2
p. 67,392 ..... 2, 4

In the Supreme Court of the United States

No. 10-339

KIRK BENOIT, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 608 F.3d 17. The opinion of the district court (Pet. App. 16a-47a) is reported at 577 F. Supp. 2d 12.

JURISDICTION

The judgment of the court of appeals was entered on June 11, 2010. The petition for a writ of certiorari was filed on September 8, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Since 1966, United States Department of Agriculture (USDA) regulations have proscribed discrimination in its programs based on "race, color, religion, sex,

age, [and] national origin," among other attributes. 7 C.F.R. 15d.2; see 31 Fed. Reg. 8175 (1966) (promulgating 7 C.F.R. 15.52 (1997), the predecessor to 7 C.F.R. 15d.4). USDA regulations have further provided that the agency can receive complaints about such discrimination. If a farmer files such a complaint, and USDA concludes that the complaint is meritorious, the agency is authorized to take corrective action. 7 C.F.R. 15d.4; see 7 C.F.R. 15.52 (1997).

When the claimed discrimination involves USDA's loan programs, other remedies are also available. In particular, farmers who think they are victims of credit discrimination can file suit under the Equal Credit Opportunity Act (ECOA), 15 U.S.C. 1691(a)(1), which prohibits creditors—including USDA—from engaging in racial and gender discrimination. A successful ECOA plaintiff is eligible to receive compensatory damages, as well as costs and attorney's fees. [illegible] S.C. 1691e(a) and (d). There is no requirement that a farmer file a complaint with USDA as a prerequisite to maintaining an ECOA suit. See Nondiscrimination in USDA Conducted Programs and Activities, 63 Fed. Reg. 62,962, 62,963 (1998).

b. Between 1981 and 1998, a number of farmers filed discrimination complaints with USDA in accordance with the agency's complaint process. Despite the fact that many of the farmers alleged discrimination in USDA's credit programs, they did not bring suit under ECOA. 63 Fed. Reg. 67,392 (1998). In light of ECOA's two-year statute of limitations, 15 U.S.C. 1691e(f), it was clear by 1998 that few of those farmers had timely ECOA claims against USDA for any discrimination that had occurred over the preceding two decades. 63 Fed. Reg. at 67,392.

In 1998, Congress enacted the statute known as Section 741. Ominbus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, § 741, 112 Stat. 2681-30 (7 U.S.C. 2279 note). Section 741, entitled "Waiver of Statute of Limitations," gave potential claimants two years from the date of its enactment to seek relief for discrimination alleged in an "eligible complaint," *i.e.*, a complaint filed with USDA before July 1, 1997. 112 Stat. 2681-30. Section 741 also gave claimants an explicit choice in *how* they wanted to seek such relief: they could (1) file an action directly in federal court, § 741(a), or (2) "in lieu of filing a civil action, seek a determination on the merits of the eligible complaint" through a special administrative process, § 741(b). *Ibid.*

If a claimant chose the administrative route, Section 741(b) directed USDA to provide the claimant an opportunity for a hearing and, if the claimant was successful, to award the claimant the relief he or she would be entitled to under the statute that provided the basis for the claim. § 741(b)(1) and (2), 112 Stat. 2681-30. Section 741(b) also directed USDA to "issue a written determination and propose a resolution" on the complaint "to the maximum extent practicable within 180 days" after a claimant sought an administrative determination. § 741(b)(3), 112 Stat. 2681-31.

If an eligible claim was "denied administratively," the claimant was given "at least 180 days to commence a cause of action in a Federal court of competent jurisdiction seeking a review of such denial." § 741(c), 112 Stat. 2681-31. Jurisdiction to conduct de novo "judicial review of a determination in an administrative proceeding" under Section 741(b) was vested in the federal dis-

trict courts and the Court of Federal Claims. § 741(d) and (g), 112 Stat. 2681-31.

c. Shortly after Section 741 was enacted, USDA promulgated regulations to govern its administrative review of "eligible complaints" under that statute. See 63 Fed. Reg. at 67,392. Those regulations are distinct from the regulations governing USDA's handling of discrimination complaints more generally. Compare 7 C.F.R. 15f (Section 741 complaint regulations) with 7 C.F.R. 15d (see p. 2, *supra*).

The Section 741 regulations instruct USDA initially to refer complaints to the Director of USDA's Office of Civil Rights (Director), who conducts an "informal review" to see if the complaint can be resolved outside the formal hearing process. 7 C.F.R. 15f.8. If the Director concludes that the complaint is an "eligible complaint," he will examine documents submitted by the claimant and any existing agency files, and may refer the case for an investigation. 7 C.F.R. 15f.9. After that process, the Director will either undertake settlement negotiations or instead inform the claimant that USDA's civil rights office "will not settle the complaint." *Ibid.* If the Director pursues settlement, and the matter is ultimately resolved to the satisfaction of all sides, the Director "will issue a final determination disposing of the matter." *Ibid.* If the matter is not settled, the Director must inform the claimant of his or her "options, including [the] right to request formal proceedings before an ALJ." *Ibid.*

There is no requirement that a claimant await a decision by the Director; the claimant can choose to bypass the Director's review "at any time" and go directly to an administrative law judge (ALJ). 7 C.F.R. 15f.10. If the claimant does not opt out of the Director's review, and

the Director issues a notice declining to settle the case, the claimant must request a formal ALJ hearing within 30 days of receiving the Director's notice. 7 C.F.R. 15f.9. If the claimant timely requests a formal ALJ hearing, the ALJ generally will hold a hearing at which parties can present testimony, argument, and evidence. 7 C.F.R. 15f.21(d).[1]

Ultimately, the ALJ will issue a "proposed determination," which will "become the final determination 35 days after it is made, unless" the claimant requests that the Assistant Secretary of Civil Rights review the ALJ's proposed determination (or the Assistant Secretary sua sponte decides to do so). 7 C.F.R. 15f.24(a). If there is such a request (or sua sponte decision) for further review, the Assistant Secretary will examine the case and issue the agency's "final determination." *Ibid.* "To the maximum extent practicable, a final determination will be made within 180 days" after the claimant files his or her Section 741 request. 7 C.F.R. 15f.24(b). A claimant has "at least 180 days after a final determination denying [an] eligible complaint under these rules to seek judicial review" in a court of competent jurisdiction. 7 C.F.R. 15f.26.

2. Petitioners are twelve African-American farmers who allege that USDA discriminated against them on the basis of race (and, in one case, gender) in administering various farm-loan and non-credit benefit pro-

---

[1] The Section 741 regulations note two circumstances in which a claimant is not entitled to an ALJ hearing before a final determination is rendered: (1) if the ALJ determines that the claimant never filed an "eligible complaint," or (2) if the dispute is limited to a question of law. 7 C.F.R. 15f.12.

grams. Pet. App. 2a.[2] Petitioners assert that they previously had filed "eligible complaints" within the meaning of Section 741. *Id.* at 3a. Between 1998 and 2000, they asked USDA to adjudicate their complaints under the administrative option set out in Section 741(b). *Ibid.*; see C.A. App. 344-45, 379-380, 414-415, 439-440, 473-474, 518-519, 561, 564.[3]

In accordance with the governing regulations, petitioners' complaints were referred to the Director for an informal settlement review. None of the petitioners ever exercised the right to bypass the Director and proceed directly to an ALJ hearing. Pet. App. 4a; C.A. App. 319-324.

Between March and May of 2003, the Director sent letters to petitioners notifying them that he had completed his informal review. In most cases, he stated that he had found the complaints inappropriate for settlement negotiation. C.A. App. 334, 374-375, 410, 435, 469, 523. In the remaining letters, the Director indicated that portions of the complaints might be appropriate for informal resolution, while others were not. *Id.* at 340, 511. All of the letters stated:

> [I]f you disagree with our decision you must request a hearing before an administrative law judge (ALJ) within thirty (30) days of receipt of this letter. Otherwise, USDA will close your file in this matter. A copy of the regulations governing this procedure is enclosed for your convenience. * * * If you receive

---

[2] Fourteen plaintiffs originally filed suit in this action, but two of them have not sought this Court's review. See Pet. ii n.1; Pet. App. 12a.

[3] Two of the petitioners did not file formal requests for adjudication, but their filings were nonetheless treated as such under the agency's regulations. See 7 C.F.R. 15f.5; C.A. App. 319-320, 328-334, 338-340.

> the ALJ's final decision and you are not satisfied, you may pursue your complaint by filing an action in Federal District Court.

Pet. App. 51a-52a; C.A. App. 334-335, 340-341, 375-376, 410-411, 436, 469-470, 511-512, 524.

Notwithstanding that notice, petitioners never requested ALJ review. Instead, they filed suit in district court in September 2003, alleging discrimination in USDA's loan programs along with various other claims for relief. Pet. App. 2a, 4a; C.A. App. 5.

3. a. USDA filed a motion to dismiss petitioners' claims, which the district court converted to a motion for summary judgment and then granted. Pet. App. 16a-49a. The court held that petitioners' ECOA claims failed for lack of exhaustion because petitioners never sought an ALJ decision on their discrimination complaints and thus never received a final agency decision. *Id.* at 37a-42a. The court grounded the exhaustion requirement not only in Section 741 and the regulations promulgated thereunder, but also in 7 U.S.C. 6912(e), which requires plaintiffs to "exhaust all administrative appeal procedures established by" USDA before suing the agency. Pet. App. 32a n.12. The court also applied the balancing test set out in *McCarthy* v. *Madigan*, 503 U.S. 140 (1992). After weighing petitioners' interest in immediate judicial review against the purposes served by the exhaustion doctrine, the court concluded that it would be inappropriate to excuse petitioners' failure to exhaust. Pet. App. 38a-39a & n.16.[4]

---

[4] The district court also considered petitioners' non-ECOA claims for monetary relief under the Constitution, the Administrative Procedure Act (APA), 42 U.S.C. 1981, and the common law. It held that all were barred by sovereign immunity. Pet. App. 45a-46a. The court of appeals

b. The court of appeals affirmed. Pet. App. 1a-13a. In considering petitioners' ECOA claims, the court first observed that petitioners had conceded at oral argument that Section 741(c) requires exhaustion. *Id.* at 8a n.* ("[T]he plaintiffs concede [that] § 741 requires exhaustion.") (citing oral argument recording); see *id.* at 9a ("The parties agree * * * that § 741(c) implicitly requires exhaustion."). Although petitioners had suggested that imposing the exhaustion requirement applied by the district court might be inconsistent with *Darby* v. *Cisneros*, 509 U.S. 137 (1993), the court concluded that *Darby* was inapplicable: petitioners' suit was brought under Section 741(c) rather than the APA, and Section 741(c) requires exhaustion. Pet. App. 8a n.*.[5]

The court of appeals then turned to whether petitioners had satisfied the exhaustion requirement in this case. The court observed that under Section 741(c), a plaintiff could seek judicial review only if his USDA claim was "denied administratively." Pet. App. 8a. Pursuant to USDA's regulations, the court explained, the Director had not "denied" petitioners' claims; rather, the Director had informed petitioners that he was declining to settle their complaints. *Ibid.* The court further explained that under the governing regulations, an administrative denial of the claim could occur only after an ALJ hearing, which petitioners had failed to request

---

affirmed, *id.* at 5a-7a, and petitioners do not seek this Court's review of the dismissal of those claims.

[5] The court of appeals also observed that 7 U.S.C. 6912(e) separately "requires exhaustion in suits against USDA generally," Pet. App. 9a-10a, but the court did not resolve whether that statute mandated exhaustion in this case.

at any point before or after receipt of the Director's letters. *Id.* at 8a-9a.

The government argued that because exhaustion was statutorily required in this case, the court lacked authority to excuse exhaustion for any reason. See Pet. App. 10a; *Booth* v. *Churner*, 532 U.S. 731, 741 n.6 (2001) ("[W]e will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise."). The court found it unnecessary to address that argument. Pet. App. 10a. Instead, the court concluded that even if it had discretion to excuse petitioners' failure to exhaust the administrative process, exhaustion should not be excused in this case under the balancing test set out in *McCarthy*, *supra*. Pet. App. 10a. On one side, the court explained that an exhaustion requirement was beneficial because it gave USDA the opportunity "to correct its own errors" and because requiring a formal ALJ hearing would produce "a useful record for subsequent judicial consideration." *Id.* at 10a-11a (quoting *McCarthy*, 503 U.S. at 145-146). On the other side, while petitioners asserted that they had a weighty interest in immediate review in light of the Director's delays, the court explained that the asserted interest was undermined by the fact that the plaintiffs had failed to exercise their option to bypass the Director and request ALJ review. *Id.* at 12a. The court also noted that there was no reason to doubt that ALJ hearings would have proceeded expeditiously had they been requested. *Ibid.* Accordingly, the court concluded that petitioners' interests in immediate review did not sufficiently outweigh the government's interests in requiring exhaustion. *Id.* at 12a-13a.

ARGUMENT

Petitioners contend that they exhausted their administrative remedies and that, in any event, any failure to exhaust should be excused in this case. The court of appeals correctly held, however, that petitioners failed to exhaust their remedies when they did not request an ALJ hearing and that their failure should not be excused. The court's decision does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioners first argue (Pet. 11-14) that they sufficiently exhausted their administrative remedies. Specifically, petitioners assert that they all received letters from the Director "denying their claims," Pet. 13, and that their claims were thus "denied administratively" within the meaning of Section 741(c), Pet. 13-14. Petitioners argue that Congress did not require them to pursue any further administrative action to exhaust their claims under Section 741. *Ibid.*

As the court of appeals held (Pet. App. 8a-9a), however, the Director's letters do not constitute an administrative denial of their claims as required by Section 741(c).[6] When a claimant elects the administrative process under Section 741(b) "in lieu of filing a civil action" under Section 741(a), the claimant must complete the

---

[6] The government argued below that petitioners were separately required to exhaust administrative remedies under 7 U.S.C. 6912(e), which dictates that "[n]otwithstanding any other provision of law, a person shall exhaust all administrative appeal procedures established by [USDA] or required by law before the person may bring an action in a court of competent jurisdiction" against USDA. See Pet. App. 32a n.12. Although the court of appeals did not reach that ground (*id.* at 9a-10a), Section 6912(e) provides an independent basis to affirm the decision below.

administrative process before seeking judicial review under Section 741(c). Contrary to petitioners' characterization, the Director's letters rejected only the possibility of "informal resolution" of the complaint, *i.e.*, settlement. *E.g.*, *id.* at 51a ("Based on our review, we have determined that your case is not appropriate for informal resolution."); C.A. App. 469 ("[Y]our case was heard by a neutral third party as part of [the Office of Civil Rights's] Alternative Dispute Resolution (ADR) Program. * * * The parties were unable to reach a mutually satisfactory resolution of this matter.").[7] A letter declining informal resolution is not a decision that constitutes administrative denial of a pending claim or marks the end of the administrative process.

USDA's regulations clarify that only an ALJ, or the Assistant Secretary for Civil Rights following an ALJ hearing, is authorized to issue a "final determination" denying a complaint. See 7 C.F.R. 15f.12, 15f.13. By contrast, if the Director decides not to pursue informal resolution of a complaint, the Director issues a letter informing the claimant only that the Office of Civil Rights "will not settle the complaint." 7 C.F.R. 15f.9. To receive a final agency determination once settlement

---

[7] The wording was somewhat different in the two letters in which the Director offered to engage in settlement negotiations over some of the claims, see C.A. App. 340-41 (letter to petitioner Cotton); *id.* at 511 (letter to petitioners Donnell, Randolph, and Bruce Manigo), and in one letter in which the Director stated that he had completed his review and concluded that the complaint was not an eligible complaint, see *id.* at 374-375 (letter to petitioner Deloney). But like the other letters, those letters made clear that if the recipient was dissatisfied with the Director's conclusion, the recipient "must request a hearing before an administrative law judge * * * within thirty (30) days of receipt of this letter." *Id.* at 340, 375, 511. In any event, petitioners do not suggest that a different outcome is warranted in those cases.

was declined, petitioners thus were required to "request formal proceedings before an ALJ * * * within 30 days of receipt of notice from the Director that [the Office of Civil Rights] will not settle the complaint." *Ibid.*[8]

As the court of appeals determined (Pet. App. 8a n.*), petitioners' reliance (Pet. 14) on *Darby* v. *Cisneros*, 509 U.S. 137 (1993), is inapt. In *Darby*, a claimant before the Department of Housing and Urban Development (HUD) attempted to obtain judicial review under the APA of a decision rendered by an ALJ without first seeking discretionary review of that decision by the Secretary of HUD. *Id.* at 140-142. Framing the question as whether "federal courts have the authority to require that a plaintiff exhaust available administrative remedies before seeking judicial review under the Administrative Procedure Act * * * *where neither the statute nor agency rules specifically mandate exhaustion as a prerequisite to judicial review*," this Court answered no. *Id.* at 138, 146 (emphasis added).

As an initial matter, this case is governed by Section 741, not the APA, and petitioners conceded in the court of appeals that Section 741 at least implicitly requires exhaustion. Pet. App. 8a n.*, 9a; see *Darby*, 509 U.S. at 153-154 ("[T]he exhaustion doctrine continues to apply as a matter of judicial discretion in cases not governed by the APA."). Moreover, as discussed above (pp. 10-11, *supra*), Section 741(c) and 7 C.F.R. 15f contemplate final

---

[8] Although the regulations are clear on this point, petitioners could not succeed even if the regulations were deemed ambiguous. USDA would be entitled to controlling deference. See *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (explaining that an agency's interpretation of its own regulations is entitled to "controlling weight unless it is plainly erroneous or inconsistent with the regulation") (quoting *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

agency denial of a claim, not merely a Director's denial of informal resolution, before it becomes ripe for judicial review. Unlike *Darby*, therefore, this is not an APA case "where neither the statute nor agency rules specifically mandate exhaustion." 509 U.S. at 138. To the contrary, the statute and agency rules both require claimants to obtain an administrative denial of their claims by an ALJ before seeking judicial review.

Even if Section 741 were ambiguous—which it is not—USDA is entitled to deference in its interpretation of the provision. See *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984). Petitioners point to nothing in Section 741 that unambiguously equates the Director's settlement evaluation with a definitive agency denial of a claim subject to judicial review. That is especially true where, as here, the relevant regulations reinforce the "strong presumption * * * that judicial review will be available only when agency action becomes final." *Bell* v. *New Jersey*, 461 U.S. 773, 778 (1983). Moreover, petitioners do not cite any decision of another court of appeals that even arguably conflicts with the decisions below.

2. Petitioners alternatively challenge (Pet. 15-17) the court of appeals' rejection of their contention that their failure to exhaust should have been excused. But petitioners do not allege that there is any conflict among the courts of appeals on that issue, and although they do allege a factbound misapplication of this Court's decision in *McCarthy* v. *Madigan*, 503 U.S. 140 (1992), even that contention is incorrect.

In *McCarthy*, the Court stated that the "general rule" is that parties must "exhaust prescribed administrative remedies before seeking relief from the federal courts." 503 U.S. at 144-145. The Court recognized,

however, that in certain cases a court may excuse that requirement after it "balance[s] the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion." *Id.* at 146.

Here, several institutional interests favor adherence to the exhaustion requirement. As the court of appeals recognized (Pet. App. 10a-11a), requiring exhaustion would afford USDA the opportunity to correct its own errors, thereby potentially preventing the need for judicial involvement. See *McKart* v. *United States*, 395 U.S. 185, 195 (1969) ("[N]otions of administrative autonomy require that the agency be given a chance to discover and correct its own errors."). Moreover, requiring a formal ALJ hearing would produce "a useful record for subsequent judicial consideration" of petitioners' fact-based discrimination claims. *McCarthy*, 503 U.S. at 145-146; see 7 C.F.R. 15f.21(d)(1). Indeed, the age of the underlying claims raises particular concerns about unavailable evidence—a problem exacerbated by the lack of a formal agency record for judicial review.

Notwithstanding those unrebutted interests, petitioners contend (Pet. 15-17) that they were entitled to immediate judicial review because the Director took what they regard as an excessive amount of time to complete his informal settlement evaluation. But, as the court of appeals noted (Pet. App. 12a), petitioners were free to bypass the Director *at any time* by proceeding directly to an ALJ hearing. See 7 C.F.R. 15f.10. Moreover, at the time Section 741 was enacted, petitioners were given the option to bypass the agency entirely by bringing an action directly in federal court under Section 741(a). This is thus not a case in which petitioners were trapped in administrative proceedings with no way

to advance. Instead, petitioners chose to submit their claims to the agency instead of the courts, and then chose to await the conclusion of the Director's review instead of proceeding to an ALJ hearing.

Finally, petitioners contend (Pet. 17) that they were entitled to immediate judicial review because USDA's civil rights office had problems processing complaints in the 1980s and early 1990s. But that concern was addressed when Congress passed Section 741 in 1998. Section 741 gave petitioners the option of going directly to federal court, or instead submitting their claims to USDA under a new complaint process with statutorily mandated safeguards. See p. 3, *supra*. Petitioners chose the latter procedure, and they proffer no specific reason to question the competence, fairness, and efficiency of ALJ decisionmaking under that procedure had they pursued it to completion. See Pet. App. 12a. Indeed, two of petitioners' co-claimants requested and were provided ALJ hearings during this litigation, *ibid.*; one of them received a favorable ALJ decision awarding him damages, see *McDonald* v. *Vilsack*, SOL Docket No. 09-0177, 2010 WL 3025816 (U.S.D.A. July 8, 2010), and the other settled his administrative complaint, see *In re Richard Pearson*, SOL Docket No. 09-0178 (U.S.D.A. Oct. 13, 2010).

In sum, as the court of appeals concluded (Pet. App. 12a-13a), even if the court has authority to excuse a failure to exhaust the administrative process under Section 741, petitioners' interests in immediate review did not sufficiently outweigh the government's interests in re-

quiring exhaustion. In any event, that factbound issue does not warrant this Court's review.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
TONY WEST
Assistant Attorney General
MARLEIGH D. DOVER
BENJAMIN M. SHULTZ
Attorneys

DECEMBER 2010

---

[9] The government further argued below that courts lack authority to excuse a failure to exhaust under Section 741 and under 7 U.S.C. 6912(e), discussed at note 6, *supra*. The court of appeals did not reach that argument. Pet. App. 9a-10a. That alternative argument, however, would furnish an alternative ground for affirmance and provides yet another reason against further review.